No. 11530.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN HAYMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Chief Assistant U. S. Attorney,

WILLIAM STRONG,
Assistant U. S. Attorney;

PAUL FITTING,
Assistant U. S. Attorney,

United States Postoffice and
Courthouse Bldg., Los Angeles (12),
Attorneys for Appellee The United States of America.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

PAGE

Jurisdictional statement 1

Statutes involved 2

Statement of the case 3

Facts 5

Summary of argument 7

I.

The acts charged in the indictment were proven to have occurred within the statute of limitations 8

II.

There can be a conviction on the uncorroborated testimony of accomplices 9

Conclusion 11

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Caminetti v. United States, 242 U. S. 470	9
Cornett v. United States, 7 F. (2d) 531	9
Hume v. United States, 118 Fed. 689; cert. den. 189 U. S. 510	9
Kempe v. United States, 151 F. (2d) 680	9
Ledbetter v. United States, 170 U. S. 606	9
Robertson v. United States, 111 F. (2d) 1018	9
United States v. Wilson, 154 F. (2d) 802	9
Weeks v. Zerbst, 85 F. (2d) 996	9
Westenrider v. United States, 134 F. (2d) 772	9

Statutes

Judicial Code, Sec. 24 (28 U. S. C. 41 (2))	1
Judicial Code, Sec. 128 (28 U. S. C. 225)	1
United States Code, Title 18, Sec. 73	1, 2
United States Code, Title 18, Sec. 78	1
United States Code, Title 18, Sec. 88	1, 3
United States Code, Title 18, Sec. 582	9

No. 11530.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN HAYMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellant was indicted under Sections 78, 73, and 88, of Title 18 of the United States Code. The District Court had jurisdiction of the cause under Section 24 of the Judicial Code (28 U. S. C. 41 (2)). The offenses charged were committed in the City of Los Angeles, State of California [R. 113, 94, 100, 73, 79, 85].[1] Judgment was entered on January 20, 1947 [R. 14-16] and a corrected judgment was entered *nunc pro tunc* on February 18, 1947 [R. 17-20]. Notice of appeal was filed on January 27, 1947 [R. 20]. This court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

---

[1]The references preceded by "R." are to the printed Record on Appeal; those by "A. B." are to Appellant's Opening Brief.

Statutes Involved.

Count One of the indictment is under Section 78 of Title 18 of United States Code, which provides, in part:

> "Whoever shall falsely personate . . . any person entitled to any annuity, dividend, pension, prize money, wages, or other debt due from United States, and, under color of such false personation, . . . shall receive or endeavor to receive . . . the money of any person really entitled to receive such annuity, dividend, pension, prize money, wages, or other debt, shall be fined not more than $5,000 and imprisoned not more than ten years."

Counts Two through Five, both inclusive, are under Section 73 of Title 18 of the United States Code, which provides in part:

> "Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or whoever shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; * * * shall be fined not more than $1,000 and imprisoned not more than ten years."

Count Six is brought under Section 88 of Title 18 which provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Statement of the Case.

On November 20, 1946, the federal Grand Jury at Los Angeles returned an indictment in six counts, which was filed that day in the United States District Court for the Southern District of California, Central Division, charging appellant with personation of the holder of a Government obligation, forging and uttering Government checks, and conspiracy to commit offenses against the United States [R. 2-11].

The first three counts of the indictment involved a check for $100 dated March 24, 1946, payable to Samuel T. Thompson, drawn on the Treasurer of the United States for mustering out pay. Count One charged appellant with impersonating Thompson and under color of such personation receiving and endeavoring to receive the money due under the check [R. 2-3]. Count Two charged appellant with causing the same check to be forged and counterfeited by causing the signature of the payee to be endorsed thereon [R. 4-5]; and Count Three charged

appellant with uttering and publishing, and causing to be uttered and published as true, the same check [R. 5-6].

Counts Four, Five and Six involved a check dated February 28, 1946, payable to 1st Lt. Charles A. Wilbun, drawn on the Treasurer of the United States in the amount of $282.50. Count Four charged appellant with causing the check to be forged and counterfeited by causing the signature of the payee to be endorsed thereon [R. 7-8]. Count Five charged appellant with causing the forged check to be uttered and published as true [R. 8-9]; and Count Six charged a conspiracy between appellant and others to forge and counterfeit the same check and to utter it as true [R. 10-11].

Appellant pleaded not guilty to all six counts on December 2, 1946 [R. 12]. Trial by jury was waived [R. 12], and appellant was tried before the Honorable William C. Mathes, District Judge, on January 7, 1947, and was found guilty on all six counts [R. 12-13]. On January 20, 1947, appellant was sentenced [R. 14-16], and the sentence was corrected *nunc pro tunc* pursuant to Rule 35 of the Rules of Criminal Procedure on February 18, 1947 [R. 17-20], to be imprisoned for ten years and fined $2,000.00 on Count One, to be imprisoned for ten years and fined $1,000.00 on each of Counts Two, Three, Four, and Five, and fined $10,000.00 on Count Six. Imprisonment sentences under Counts One and Two were to run consecutively, and those under Counts Three, Four, and Five to run concurrently with Count Two, so that the total imprisonment served would be twenty years, and a

payment of $10,000.00 would satisfy all fines. Appellant was ordered committed until the fines were paid [R. 17-20].

Facts.

Appellant was engaged in stealing, forging, and cashing, Government checks; his general operations were described by his associates, two women, Juanita Jackson and Dorothy McClain, and one man, Paul Chester Redd, III. Appellant would drive the women around the streets of Los Angeles in his car, would park, and would tell them to go to a mail box a few houses back and take out the check that was in it [R. 85, 39, 47-53, 68, 70-71, 82-85]. Appellant explained to them that a woman was less conspicuous going to a mail box than a man [R. 53].

Either the women [R. 40, 62, 71, 70] or Redd [R. 95-96, 100-105] subsequently endorsed the checks with the name of the payee, at appellant's request. Sometimes the women also endorsed checks brought to them by the appellant which they had not stolen [R. 46, 70].

Appellant furnished the girls with identification cards to correspond with the names on the checks [R. 40-42, 57, 71-72, 89-90]. The girls then cashed the checks, usually at liquor stores, men's stores, and sometimes at check cashing agencies [R. 42, 55, 71, 77, 92-93], with appellant driving them to the place of cashing [R. 61, 90-93]. The girls turned the proceeds over to appellant [R. 40, 60, 71, 91], and he then gave them back a small part of the amount [R. 63, 71, 91]. Appellant also some-

times gave something to Redd for endorsing checks for him [R. 96, 104, 106-107]. Appellant had at least one other girl working for him in the same way [R. 88]. There were about fifty checks in all involved [R. 41; see also R. 77].

The check for $100 payable to Samuel T. Thompson, which is involved in the first three counts of the Indictment [Gov. Ex. 4, R. 24-25], bore on its back the endorsement "Samuel T. Thompson." Samuel T. Thompson testified it was not his signature [R. 34], that he had not authorized anyone to sign the check for him [R. 34], and that he had never received the proceeds of the check [R. 35].

Appellant had brought the Thompson check to Redd and, at appellant's request, Redd had endorsed "Samuel T. Thompson" thereon [R. 94-95]. Appellant then bought two bottles of whiskey at the liquor store of Jackson H. Martin in Los Angeles, tendering the check in payment [R. 110], stating to Martin that he, appellant, was Samuel T. Thompson [R. 111], and that the endorsement was his signature [R. 112]. Martin cashed the check, giving appellant the balance remaining above the price of the liquor [R. 111].

The check for $282.50 payable to 1st Lt. Charles A. Wilbun, which was involved in the Fourth, Fifth, and Sixth counts of the Indictment [Gov. Ex. 2, R. 23] bore the endorsements, "Charles A. Wilbun" and "Gloria W. Wilbun."

Charles A. Wilbun testified that the endorsement was not his signature, that he had not authorized anyone to endorse the check for him, and that he had never received the proceeds of the check [R. 36-37].

This check had been cashed under the following circumstances: Appellant, with Dorothy McClain and another, went to Goodwin's Shoe Store in Hollywood [R. 73, 116, 137] where they bought three pairs of shoes and a pair of slippers of a size to fit appellant [Gov. Ex. 5, R. 26, 116; see also Gov. Ex. 3, R. 124, 75]. Dorothy McClain then endorsed the Wilbun check in the store [R. 73, 79-80, 122], and gave it in payment for the shoes, receiving the excess in cash. She gave the cash to appellant, and he gave some of it back to her [R. 74, 81-82].

Summary of Argument.

Only two points are argued by appellant in his brief, and they are both without merit. The evidence introduced by the Government clearly establishes that the offenses charged were committed within the Statute of Limitations, and fixes the dates on about which the offenses were committed. The law in the Federal courts is clear that a defendant can be convicted on the uncorroborated testimony of an accomplice. Moreover, appellant in this case was convicted on far more evidence than the uncorroborated testimony of accomplices.

I.

The Acts Charged in the Indictment Were Proven to Have Occurred Within the Statute of Limitations.

Appellant contends that there is no evidence that the crimes charged were committed within the period of the Statute of Limitations (A. B. 6-11). We disagree. The evidence plainly supports the judgment.

The Thompson check, involved in the first three counts of the Indictment, is dated March 24, 1946. It bears on its back the stamped endorsements of two banks dated March 27, 1946, and March 28, 1946. It is cancelled by the perforations "4 4 46" [Gov. Ex. 4, R. 25]. In addition, Jackson H. Martin testified that the check was cashed by him for appellant in about the middle of March [R. 115]. Redd, who endorsed the Thompson check, stated that he met appellant for the first time in June of 1945 [R. 94, 100] and that he started endorsing checks for appellant some time in 1945 [R. 103-106].

The Wilbun check, involved in Counts Four, Five and Six of the Indictment, is dated February 28, 1946. It bears on its back the stamped endorsement of a bank dated March 6, 1946. It is cancelled by the perforations "3 13 46." [Gov. Ex. 2, R. 23]. Dorothy McClain, who admittedly cashed the check, met the defendant for the first time towards the end of 1945 or the first part of 1946 [R. 69, 78].

From these facts it is manifest that there is substantial evidence fixing the dates of these occurrences well within

the period of the Statute of Limitations, which in attempts to defraud the United States is six years (18 U. S. C. 582).

Moreover, it is settled that an offense need not be proven to have been committed on the day alleged, unless the day is made material by the statute. Proof of any day before the finding of the indictment and within the Statute of Limitations is sufficient. *Ledbetter v. U. S.*, 170 U. S. 606, 612 (1898); *Cornett v. U. S.*, 7 F. (2d) 531, 532 (C. C. A. 8, 1925); *Weeks v. Zerbst*, 85 F. (2d) 996, 997 (C. C. A. 10, 1936); *Hume v. U. S.*, 118 Fed. 689, 696 (C. C. A. 5, 1902), cert. den. 189 U. S. 510.

II.

There Can Be a Conviction on the Uncorroborated Testimony of Accomplices.

It is well-settled, of course, that in the Federal Courts, a defendant can be convicted on the uncorroborated testimony of an accomplice. See, *e. g., Caminetti v. United States,* 242 U. S. 470, 495 (1917); *Westenrider v. United States,* 134 F. (2d) 772, 774 (C. C. A. 9, 1943); *United States v. Wilson,* 154 F. (2d) 802, 805 (C. C. A. 2, 1946, Judgment vacated and remanded for resentence 328 U. S. 823); *Kempe v. United States,* 151 F. (2d) 680, 686 (C. C. A. 8, 1945); *Robertson v. United States,* 111 F. (2d) 1018 (C. C. A. 6, 1940).

Appellant's reliance on State cases is clearly misplaced.

Moreover, in this case appellant was convicted on far more than the uncorroborated testimony of accomplices.

Both Samuel T. Thompson and Charles A. Wilbun, the payees of the two checks involved, testified that the checks had never been endorsed by them or with their permission, and that they had never received the proceeds of the checks [R. 34-35, 36-37]. Jackson H. Martin, the owner of the liquor store where appellant appeared with the Thompson check, masquerading as Thompson, and cashed it, identified appellant, and testified concerning the entire transaction [R. 110-115]. S. Kendall Gibson, the manager of the Goodwin Shoe Store in Hollywood, testified as to the entire transaction when Dorothy McClain and appellant bought shoes at his store and negotiated the Wilbun check in payment [R. 116-123].

The sales slip for the shoes [Gov. Ex. 5, R. 26] shows that they were sold to Charles A. Wilbun and that a check for $282.50 was taken in payment for the shoes.

Appellant, in his testimony, admitted that he had purchased the shoes under the circumstances related, but contended that it was all Dorothy McClain's idea and that she merely gave him one of the pairs of shoes [R. 137-139].

From this it is plain that appellant was convicted on more than the mere uncorroborated testimony of an accomplice, which alone clearly would have furnished sufficient evidentiary basis for the conviction and judgment in this case.

Conclusion.

It is apparent from the record that appellant had a fair trial, and that he was convicted with the overwhelming weight of the evidence against him as to each count. The points urged by appellant on this appeal are plainly not substantial. The conviction should be affirmed.[2]

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;
ERNEST A. TOLIN,
Chief Assistant U. S. Attorney,
WILLIAM STRONG,
Assistant U. S. Attorney;
PAUL FITTING,
Assistant U. S. Attorney,
Attorneys for Appellee The United States of America.

---

[2]Of course it is elementary that where a judgment provides for concurrent sentences on two or more counts, it is sufficient if any one of the counts on which sentences run concurrently can be sustained on appeal.